United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-1952

To be argued by
PETER A. CLARK

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-1952

UNITED STATES OF AMERICA,

Appellee,

—v.—

JAMES T. LATA,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE APPELLEE

PETER C. DORSEY
United States Attorney
District of Connecticut
United States Court House
New Haven, Connecticut 06510

PETER A. CLARK
Assistant United States Attorney
Of Counsel.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statute Involved

RULE 33, FED. R. CRIM. P.

NEW TRIAL

The court on motion of a defendant may grant a new trial to him if required in the interest of justice. If trial was by the court without a jury the court on motion of a defendant for a new trial may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 7 days after verdict or finding of guilty or within such further time as the court may fix during the 7-day period.

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-1952

UNITED STATES OF AMERICA,

Appellee,

—v.—

JAMES T. LATA,

Defendant-Appellant.

BRIEF FOR THE APPELLEE

Questions Presented

I. Did the trial court err in denying petitioner's motion for a new trial based on newly discovered evidence, which proffered evidence consisted of an affidavit, letter, and statement of a convicted co-defendant to the effect that appellant was "not guilty" and that the co-defendant knew but would not reveal the identity of a third party to the crime, when at the hearing on the motion the co-defendant was called by Lata to testify but invoked his fifth amendment privilege as to all questioning about the veracity and authorship of those out-of-court statements?

A. Are the out-of-court statements independently admissible as declarations against penal interest, either in whole or in part, at a new trial?

B. Assuming arguendo some degree of admissibility, would the admissible portions require a new trial?

Statement of Facts

James Lata and Stuart Smith were convicted of armed bank robbery after a lengthy jury trial on March 22, 1973. Subsequent to the conviction being affirmed, Smith signed an affidavit relating in pertinent part that Lata is "Not Guilty and I Stuart B. Smith will testify to same if and when called upon to do so." The affidavit was drafted and presented to Smith for signature by one Thomas Flood, a private investigator. Flood was retained by Linda Ziomek, Lata's girlfriend and co-defendant at trial who had been acquitted by motion at the close of the Government's case. Flood also testified that Smith had told him Lata had not done the bank robbery and that he, Smith, knew another party who was involved but that he would not reveal his identity. In addition, Flood produced a letter sent to him by Smith in April, 1974 inquiring about the status of the case and saying that "Lata should not have to pay for something he did not do."

When called to testify in the hearing on the instant motion, Smith refused to answer any questions regarding the veracity or authorship of the affidavit, the letter, or his conversation with Flood. The motion for a new trial was subsequently denied.

Statement of the Case

This is an appeal from a judgment of the Court (Newman, *J.*) denying appellant Lata's motion made pursuant to 28 USC 2255 seeking to vacate a sentence imposed for armed bank robbery. Lata was convicted on March 22, 1973 and was sentenced to a 21 year term of imprisonment. The conviction was affirmed without opinion. *United States* v. *Lata,* 486 F.2d 1397 (2d Cir. 1973). His first motion for new trial on the grounds of newly discovered evidence was denied on March 7, 1974.

The instant motion, pursuant to 28 USC 2255, alleged several grounds for relief, all of which were denied in an opinion of May 3, 1974. It also alleged newly discovered evidence, which the court construed as a motion for a new trial pursuant to Rule 33, F.R.C.P. and held a hearing thereon on May 20, 1974. Relief on this aspect of the motion was similarly denied, and furnishes the only issue prosecuted on this appeal.

ARGUMENT

I. The trial court properly denied appellant's motion for a new trial.

A. Smith's out-of-court declarations do not qualify for a penal interest exception to the hearsay rule and are therefore not admissible at a new trial.

Interwoven with the offer of Smith's affidavit, letter, and conversation with Flood is his claim in the affidavit that he would "testify in court if and when called upon to do so." When called upon by Lata, however, refused on grounds of privilege against self incrimination to acknowledge authorship of the various items of evidence or to comment on the veracity of the contents thereof. Appellant argues that Smith's refusal to testify at the hearing on the motion should nevertheless not be grounds for denial of the motion because his refusal may not persist if he is called at trial. Since the movant for a new trial bears a very heavy burden of persuasion, however, the more realistic posture of the matter is that the mere speculation that he *may* testify cannot justify *granting* the motion. Lata had his opportunity to present Smith's testimony at the hearing on the motion for new trial, and failed. The only basis, then, upon which the court could order a new trial is if the purported statements of Smith offered through Flood are independently admissible. Those statements are clearly hearsay and admissible only if an exception to the hearsay rule applies. Appellant urges that they are admissible as declarations against penal interest. The Government takes issue.

Assuming arguendo, as did the Court below, that Smith's invocation of privilege makes him unavailable as a witness and thus lays the predicate for a penal interest exception, the exception is nonetheless inapplicable under the

circumstances here.[1] While declarations against penal interest have traditionally been disallowed as an exception to the hearsay rule, *Donnelly* v. *United States*, 228 U.S. 243 (1913), flexibility has appeared in that prohibition of late. See *Chambers* v. *Mississippi*, 410 U.S. 284 (1973); *United States* v. *Harris*, 403 U.S. 573 (1971); *United States* v. *Marquez*, 462 F.2d 893 (2d Cir. 1972); *United States* v. *Seyfried*, 435 F.2d 696 (7th Cir. 1971); *United States* v. *Dovico*, 380 F.2d 325 (2d Cir.), *cert. denied*, 389 U.S. 944 (1967). Nevertheless, the exception does have boundaries, *United States* v. *Dovico*, *supra* at 327, and the declarant must have some reasonable expectation that he is exposing himself to criminal liability. *United States* v. *Miller*, 277 F. Supp. 200 (D. Conn. 1967). Appellant Lata urges that Smith's exposure comes from his failure to disclose the identity of the so-called true guilty party, which, it is claimed, constitutes a violation of 18 U.S.C. § 3. The crux of the matter is thus whether such non-disclosure is an offense and, perhaps even more importantly, the likelihood that Smith felt he was risking prosecution by revealing this non-disclosure. Petitioner argues that because no cases can be found saying that a mere withholding of evidence is *not* a violation of § 3, it therefore follows that it is. However, the absence of cases dealing with that precise statute and issue obviously underscore the fact that there is no such offense. In addition it is pointed out by analogy that similar statutes do in fact require a fairly high degree of positive action, as opposed to mere silence. See *United States* v. *Magness*, 456 F.2d 976 (9th Cir. 1972) [18 U.S.C. § 1071]; *United States* v. *Foy*, 416 F.2d 940 (7th Cir. 1969) [18 U.S.C. § 1071];

---

[1] Parenthetically it may be noted that this precondition for application of the exception highlights the catch-22 aspect of the first part of appellant's argument; Smith must continue to refuse to testify for Lata to qualify for the exception, but Lata urges that since he may agree to testify, Lata should not be denied a new trial on the basis of Smith's current refusal. Appellant therefore offers a two-pronged, self-cancelling argument.

United States v. *Worcester*, 190 F. Supp. 548, 566 (D. Mass. 1960) [18 U.S.C. § 4]. It is therefore submitted that, since no offense of non-disclosure exists, Smith could not be considered to have made a declaration against penal interest.

Secondly, even if there were such an offense, the declarant would have to have some reasonable expectation that he was actually exposing himself to criminal liability. *United States* v. *Miller, supra.* Surely Smith would not anticipate that the Government would, in the face of the evidence it had amassed to convict Lata, proceed to disprove Lata's guilt and try to establish the guilt of another. Furthermore, since the party is theoretically unknown to the Government, there would be no one to prove as the principal in order to convict Smith as the accessory.

In addition to the legal and evidentiary hurdles presented by such a course, guilty silence is not commonly understood as criminal conduct. Admission of such conduct would therefore not likely be viewed by the declarant as putting him in jeopardy of criminal sanction. Such a declaration thus lacks the inherent trustworthiness surrounding the admission of a traditional crime, which trustworthiness is postulated as the basis for a penal interest exception. Other indicia of reliability are lacking. The statements were made long after the crime. They were basically an exculpation of a convicted co-defendant, a traditionally suspect occurrence, *Chambers* v. *Mississippi, supra* at 300. The statements were far from spontaneous; rather they resulted from a planned interview in which Smith signed an affidavit drafted by another. There is no corroboration of the statements, *United Statees* v. *Walling,* 486 F.2d 229 (9th Cir. 1973), *cert. denied,* 415 U.S. 923 (1974), which is underscored by Smith's invocation of privilege. The exculpations are vague and conclusory.

United States v. *Persico*, 339 F. Supp. 1077 (S.D.N.Y. 1972). For all of the reasons Smith's hearsay statements fail to qualify as exceptions to the hearsay rule, and are inadmissible at a new trial. A new trial is thus not mandated.

B. Assuming arguendo that the portion of Smith's statements indicating that he knows of another involved in the crime but not yet detected is admissible, that standing alone would not warrant a new trial because it would not affect the jury finding that Lata actually entered the bank and would therefore not probably produce an acquittal.

Even if it is assumed that the proffered evidence qualifies in all respects for a penal interest exception, the statements are nevertheless severable to the extent that they do not incriminate Smith, *United States* v. *Marquez, supra* at 895; *United States* v. *Seyfried, supra* at 698. The portions merely exculpating Lata would therefore not be admissible, and the motion for new trial would stand or fall only on the remainder of the statements, the substance of which is that Smith knows of another who was involved but who has not been detected. Since the jury finding that Lata entered the bank is in no way affected by the unspecified involvement of another in some unidentified phase of the crime, however, such evidence would not probably produce an acquittal and would not serve as a basis for a new trial, *United States* v. *Silverman*, 430 F.2d 106 (2d Cir. 1970). The motion was thus properly denied.

CONCLUSION

For all of the foregoing reasons, the motion for new trial was properly denied and it is respectfully urged that the decision of the District Court be affirmed.

Respectfully submitted,

PETER C. DORSEY
United States Attorney
District of Connecticut
United States Court House
New Haven, Connecticut 06510

PETER A. CLARK
Assistant United States Attorney
Of Counsel.

★ U. S. Government Printing Office 1974— 614—231—300

United States Court of Appeals
FOR THE SECOND CIRCUIT

No. 74-1952

UNITES STATES OF AMERICA

Appellee

v.

JAMES T. LATA

Appellant

AFFIDAVIT OF SERVICE BY MAIL

rt Sensale, being duly sworn, deposes and says, that deponent party to the action, is over 18 years of age and resides at 914 Brooklyn Ave ooklyn, N.Y.

hat on the 24th day of October, 1974, deponent the within Brief for the Appellee

Thomas D. Clifford, Esq.

Federal Public Defender

770 Chapel Street, New Haven, Connecticut

y(s) for the Appellant in the action, the address designated by said attorney(s) for the by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in a post fficial depository under the exclusive care and custody of the United States Post Office department he State of New York.

Albert Sensale

to before me,

24th day of October 197 4

WILLIAM A. McKAIGNEY
Notary Public, State of New York
No. 41-7846700
Qualified in Queens County
Certificate filed in Kings County
Commission Expires March 30, 1976